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NO. 94-244

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

REHABILITATION SPECIALISTS, INC.
Petitioner

VS.

SAFECO INSURANCE COMPANY OF AMERICA
AND BAYTOWN CONSTRUCTION COMPANY, INC.
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KERWIN B. STONE
MOORE, LANDREY, GARTH, JONES, BURMEISTER & HULETT, L.L.P.
390 Park Street, Suite 500
Beaumont, Texas 77701
Telephone: (409) 835-3891
Telecopier: (409) 835-2707

ATTORNEYS FOR RESPONDENT BAYTOWN CONSTRUCTION COMPANY, INC.

ANN RYAN ROBERTSON
TERESA LETSON
WINSTEAD SECHREST & MINICK
910 Travis, Suite 1600
Houston, Texas 77002
Telephone: (713) 650-2709
Telecopier: (713) 951-3800

ATTORNEYS FOR RESPONDENT SAFECO INSURANCE COMPANY OF AMERICA

BEST AVAILABLE COPY

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TO THE SUPREME COURT OF THE UNITED STATES:

COME NOW RESPONDENTS BAYTOWN CONSTRUCTION COMPANY, INC. ("BAYTOWN") and SAFECO INSURANCE COMPANY OF AMERICA ("SAFECO") and submit

the following opposition to the Petition for Writ of Certiorari filed herein by Petitioner REHABILITATION SPECIALISTS, INC. ("REHAB"):

PARTIES

Respondent BAYTOWN CONSTRUCTION COMPANY, INC.'s parent corporation is Mar-Len, Inc., a Texas corporation; said Respondent has no other parent companies or subsidiaries. Respondent SAFECO INSURANCE COMPANY OF AMERICA'S parent corporation is Safeco Corporation. Respondent has no other parent companies or subsidiaries.

STATEMENT OF THE CASE

Respondents make the following statement in order to correct an inaccuracy or omission in the statement by Petitioner. BAYTOWN was the general contractor on the several contracts in question, and SAFECO was its payment bond surety for four (4) of such contracts. Both BAYTOWN and SAFECO have at all times been parties to and active participants in this lawsuit at all stages. BAYTOWN timely and properly asserted in this lawsuit all offsets and credits to which it was entitled against REHAB, and SAFECO

timely and properly asserted its entitlement to the benefit of BAYTOWN's offsets and credits. At no time during the progress of this lawsuit has there been any allegation, any evidence, or any finding that either BAYTOWN or SAFECO was not solvent; indeed, the only insolvent party has been REHAB itself, which sought bankruptcy court protection after this suit had been filed by SAFECO, and in apparent response to the cross-claims filed by BAYTOWN against REHAB. REHAB's various statements and allusions to the supposed insolvency of SAFECO or BAYTOWN constitute gross inaccuracies. REHAB alludes to the insolvency of SAFECO at page 13 and to the insolvency of BAYTOWN at pages 18 and 23 of its Petition for Writ of Certiorari. In making such clearly insupportable statements, REHAB is apparently trying to alter the factual predicate as it pertains to the suretyship law applicable to this case.

REASONS FOR DENYING THE PETITION

I.

As confirmed by the Fifth Circuit in its Opinion (reprinted on page A-32 of REHAB's Petition), and as further admitted by REHAB

itself on page 14 of its Petition, as a general proposition of suretyship law, a surety is entitled to assert all defenses and offsets asserted by its principal. Aultman & Taylor Co. v. Hefner, 67 Tex. 54, 62, 2 S.W. 861, 864 (Tex. 1886); Robberson Steel, Inc. v. J. D. Abrams, Inc., 582 S.W.2d 558, 564-65 (Tex. Civ. App. - El Paso 1979, no writ). As noted, prior to the filing of the petition for writ of certiorari, there has never been any assertion, much less any evidence or finding, of BAYTOWN or SAFECO's being insolvent. Both BAYTOWN and SAFECO were "sued" by REHAB in the same action; the offsets and credits were timely and properly asserted by BAYTOWN and SAFECO; and both BAYTOWN and SAFECO have aggressively participated in all facets of this case. No recognized basis exists to support any limitation whatsoever on the applicability of the universally acknowledged rule of suretyship defenses under the facts of this case (see discussion of surety defenses in general at 72 C.J.S. *Principal and Surety* §§ 189-191; 74 Am. Jur. 2d *Suretyship* § 107). Certainly, the express language of the McGregor Act, Article 5160, Texas Revised Civil Statutes, fails to limit the availability of such offsets for the benefit of a surety, although the Texas

Legislature clearly could have limited the applicability had it so chosen. Instead, REHAB seeks to have this Honorable Court "legislate" restrictions where none were imposed by either the McGregor Act or by the terms of the very payment bond itself upon which REHAB has asserted its claims against SAFECO. If this Honorable Court were to impose restrictions on the availability of BAYTOWN's offsets to SAFECO at this late date, it would be changing the terms of the agreement whereby SAFECO undertook suretyship of BAYTOWN, so that the obligation of SAFECO, as the payment bond surety (along with any claims by REHAB against SAFECO), would thereby be extinguished as a matter of law.

II.

REHAB is incorrect in characterizing its complaint as a "novel" issue of state law. While BAYTOWN and SAFECO are unable to find any reported cases which discuss any limitations upon the use of offsets in the manner asserted herein by REHAB, Respondents would urge that such absence of authority falls far short of conferring any "novel" status upon this issue. Rather, Respondents suggest that the issue framed by REHAB concerning the

availability of BAYTOWN's offsets to SAFECO is so elementary that no other court or appellant has deemed it worthy of raising as an issue on appeal. Indeed, even REHAB admits that REHAB itself did not timely raise this issue in the lower court levels ("an issue that was not briefed", page 13, REHAB's Petition; "Unfortunately, these issues were not even briefed to the Court of Appeals", page 23, REHAB's Petition). Moreover, REHAB erroneously states that it "has been unable to locate any case law which even remotely supports the Court of Appeals decision on the payment bond issue" (page 23 of REHAB's Petition). In fact, the universally accepted law of suretyship defenses, as discussed above and as cited by REHAB, clearly supports such decision.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondents pray that REHAB's Petition for Writ of Certiorari be denied.

Respectfully submitted,

KERWIN B. STONE
MOORE, LANDREY, GARTH,
JONES, BURMEISTER &
HULETT, L.L.P.

390 Park Street, Suite 500
Beaumont, Texas 77701
Telephone: (409) 835-3891
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ATTORNEYS FOR RESPONDENT
BAYTOWN CONSTRUCTION
COMPANY, INC.

ANN RYAN ROBERTSON
TERESA LETSON
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MINICK P.C.
910 Travis, Suite 1600
Houston, Texas 77002
Telephone: (713) 650-2709
Telecopier: (713) 951-3800

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SAFECO INSURANCE
COMPANY OF AMERICA

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